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No. 71-957

# In the Supreme Court of the United States

OCTOBER TERM, 1971

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RICHARD R. SHALLA, PETITIONER

*v.*

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, and HONORABLE PHILIP PRATT

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ERWIN N. GRISWOLD,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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Petitioner, indicted for willful attempts to evade his federal income tax, in violation of Section 7201 of the Internal Revenue Code of 1954, moved to dismiss the indictment on the grounds that (1) only hearsay evidence was presented to the grand jury; and (2) no transcript was made of testimony before the grand jury. After the district court denied this

motion, petitioner sought a writ of mandamus in the court below to compel the district court to grant the motion to dismiss. That court denied the petition for writ of mandamus (Pet. App. 29a).

The court below correctly concluded that petitioner was not entitled to a writ of mandamus. A mandamus proceeding against a judge is an extraordinary remedy which should be reserved for exceptional cases and not used as a substitute for an appeal. *Ex parte Fahey*, 332 U.S. 258, 259-260; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 27. Cf. *Will* v. *United States*, 389 U.S. 90, 96-97. The decision of the district court "involved no abuse of judicial power, and any error which it may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment, and by this Court by writ of certiorari." *Roche* v. *Evaporated Milk Assn.*, *supra*, at 27.

Moreover, petitioner's factual contentions that only hearsay testimony was presented to the indicting grand jury and that no transcript of the testimony was made have never been established. The proposed stipulation relied upon by petitioner (Pet. App. 27a-28a) has never been signed or otherwise agreed to by a representative of the government.

Even assuming *arguendo* that the facts are as petitioner believes them to be, the federal courts have all held against petitioner's contentions. An indictment is not subject to dismissal on the ground that it is based entirely on hearsay evidence presented to the

grand jury.[1] *E.g.*, *Costello* v. *United States*, 350 U.S. 359; *Crump* v. *Anderson*, 352 F. 2d 649, 651-652 (C.A. D.C.); *United States* v. *Callahan*, 439 F. 2d 852, 860 (C.A. 2), certiorari denied, 404 U.S. 826. Nor is there any requirement that grand jury testimony be recorded or preserved. Failure to do so is therefore no ground for dismissal. *United States* v. *Montijo*, 424 F. 2d 207, 210 (C.A. 1), certiorari denied, 400 U.S. 836; *United States* v. *Cianchetti*, 315 F. 2d 584, 591 (C.A. 2).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*

MARCH 1972.

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[1] In *United States* v. *Leibowitz*, 420 F. 2d 39, the Second Circuit recently threatened to consider dismissal of future indictments if it clearly appears that only hearsay was used before the grand jury when direct testimony was available and, either the grand jury was misled into thinking it was receiving eyewitness testimony, or it appears highly probable that, with eyewitness testimony rather than hearsay testimony, the grand jury would have failed to indict. No indictment has yet been dismissed on such a ground.

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